IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

TYCO INTERNATIONAL LTD. and TYCO INTERNATIONAL (US) INC.,	)	Case No. 02-cv-7317 (TPG)
Plaintiffs,	)	ECF Case
v.	)	
L. DENNIS KOZLOWSKI,	)	
Defendant.	)	

TYCO'S MEMORANDUM OF LAW IN OPPOSITION TO KOZLOWSKI'S MOTION FOR CERTIFICATION FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292 AND ENTRY OF PARTIAL SUMMARY JUDGMENT PURSUANT TO FED. R. CIV. P. 54(b)

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INTRODUCTION

Defendant and counterclaim plaintiff L. Dennis Kozlowski ("Kozlowski") filed a motion for certification for immediate appeal, pursuant to 28 U.S.C. § 1292(b), of this Court's choice-of-law ruling applying New York law in the December 1, 2010 order granting partial summary judgment to Tyco International Ltd. and Tyco International (US) Inc. ("Tyco") ("the Summary Judgment Order" or "Op."). Kozlowski also filed a motion, pursuant to Fed. R. Civ. P. 54(b), to make final and appealable this Court's ruling dismissing certain of his counterclaims. Because Kozlowski's motions have no basis in law and are unsupported by the record, these motions should be denied.

Kozlowski claims that this Court's choice-of-law ruling "hinged on a discrete error of law" because the entire ruling purportedly relies on a legal presumption based on "the fact that the jury in the criminal case found the crimes occurred in 'New York County and elsewhere.'" (Kozlowski's Memorandum of Law in Support of His Motion for Certification for Interlocutory Appeal and For Entry of Partial Final Judgment ("Mot.") at 1). By so claiming, he ignores most of this Court's detailed choice-of-law discussion, instead creating a false premise for attacking the ruling. (Mot. 2, citing Op. 7-8). Kozlowski incorrectly claims that this Court "equated the presence of criminal jurisdiction in New York with a *legal presumption* that the substantive law of New York should govern civil claims in a related lawsuit." (Mot. 2) (emphasis added). Kozlowski is wrong.

To the contrary, this Court spent nearly 10 pages reviewing not only the jury finding but also additional undisputed facts determinative under New York's "interest analysis" test of the ruling that New York is the place of the alleged wrongs and its laws should apply. (Op. 7-8, 9-16). Furthermore, the opinion sets forth a meticulous analysis of the "internal affairs" doctrine, which this Court properly rejected because this litigation "does not involve issues of organic structure or internal administration." (Op. 15).

Finally, Kozlowski claims that if he does not obtain immediate appellate review of this Court's choice-of-law ruling he will "have no choice but to continue to litigate" because "Tyco is armed with judgment on a claim with a value in excess of Mr. Kozlowski's current net worth." (Mot. 2). The implication that this Court should grant Kozlowski's motion because the Court's ruling disadvantages Kozlowski is an argument available to every party who suffers an adverse summary judgment ruling and provides no support for Kozlowski's request for extraordinary relief under § 1292(b).[1]

Because Kozlowski has sought certification based on a mischaracterization of the Court's ruling and has failed to satisfy the statutory requirements for the extraordinary relief of certifying an interlocutory appeal under § 1292, Kozlowski's motion should be denied.

This Court also should deny Kozlowski's motion for entry of partial final judgment pursuant Rule 54(b). Tyco's affirmative claims and the dismissed counterclaims are based on related underlying facts and issues of law. Appeal of the dismissed counterclaims would result in multiple appeals of these intertwined claims which could undermine judicial efficiency and possibly lead to inconsistent rulings. Moreover, Kozlowski cannot demonstrate that there exists any hardship through delay which would be alleviated by immediate appellate review of this Court's dismissal of his claims.

Finally, Kozlowski's claim that the equities favor his immediate appeal of this Court's dismissal of his counterclaims is not well founded because Kozlowski chose not to respond to Tyco's Motion for Summary Judgment with respect to defenses dispositive of 13 of his 14 counterclaims. Kozlowski should not be heard to argue that "judicial efficiencies warrant immediate entry of final judgment" on his counterclaims when he failed to object to an independent basis for dismissing 13 of the 14 counterclaims. Accordingly, Kozlowski's Rule 54(b) motion should be denied.

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[1] Even if this were a ground for awarding relief, Kozlowski has made no disclosure of his net worth in this proceeding.

ARGUMENT

I. There Is No Basis in Law for an Interlocutory Appeal in this Case.

A. Interlocutory Appeals are "Rare Exceptions" to the Final Judgment Rule.

Interlocutory appeals are "rare exception[s]" to the general rule that federal appeals courts have jurisdiction only over appeals from final decisions. 28 U.S.C. § 1291; *Koehler v. Bank of Ber. Ltd.*, 101 F.3d 863, 865 (2d Cir. 1996) (delaying appeal until after a final judgment is rendered is a "basic tenet" of federal law). An interlocutory appeal must be based on "'exceptional circumstances' [that] justify a departure from the basic policy of postponing appellate review until after entry of final judgment," *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 25 (2d Cir. 1990), and that overcome the general aversion to piecemeal litigation. *Koehler*, 101 F.3d at 865. Indeed, the Second Circuit has consistently emphasized that a district court is to "exercise great care in making a § 1292(b) certification, and that those motions should be granted sparingly and *only* when an interlocutory appeal will avoid protracted and expensive litigation. *Estevez-Yalcin v. Children's Vill.*, 2006 U.S. Dist. LEXIS 85792, at *4-5 (S.D.N.Y. Nov. 27, 2006) (quoting *Westwood Pharm., Inc. v. Nat'l Fuel Gas Distrib. Corp.*, 964 F.2d 85, 89 (2d Cir. 1992)); *see also Klinghoffer*, 921 F.2d at 25 (noting that "the power [to grant an interlocutory appeal] must be strictly limited to the precise conditions stated in the law").

Section 1292(b) requires that the order sought to be certified "involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). An appeal may not be certified solely on the ground that it may advance the proceedings in the district court. *Williston v. Eggleston*, 410 F. Supp. 2d 274, 276 (S.D.N.Y. 2006). The determination of whether certification of an order for interlocutory appeal under § 1292(b) should issue rests firmly in the discretion of the district court. *Credit Suisse First Boston, LLC v. Intershop Comm'ns AG*, 2006 U.S. Dist. LEXIS 68459, at *6 (S.D.N.Y. Sept. 25, 2006).

B. Kozlowski Mischaracterizes this Court's Choice-of-Law Ruling as a Purely Legal Question under § 1292.

In an effort to recast this Court's choice-of-law ruling as a controlling and purely legal question about which there exists substantial ground for a difference of opinion, Kozlowski mischaracterizes the ruling's depth, scope and evidentiary basis. Kozlowski claims that "the sole question the Court of Appeals would need to answer" is whether "it was error for the District Court to hold that New York was the center of gravity of wrongdoing alleged in a civil case based on the fact that the defendant was convicted of crimes in a New York proceeding and the criminal jury found, for purposes of establishing criminal jurisdiction, that the crimes occurred 'in New York and elsewhere.'" (Mot. 9). Then, Kozlowski inaccurately asserts that "the Court equated the presence of criminal jurisdiction in New York with a *legal presumption* that the substantive law of New York should govern civil claims in a related lawsuit." (Mot. 2; *see also id*. at 1-3, 11-14) (emphasis added).

Kozlowski repeatedly mischaracterizes this Court's ruling. The Court created no presumption. Rather, the Court scrutinized relevant portions of the criminal record and found that the jury had concluded, in response to the court's instructions, beyond a reasonable doubt that the wrongful conduct occurred in New York "*and* elsewhere," not *or* elsewhere. (Op. 8;

Tyco's Statement of Undisputed Facts in Support of its Motion for Partial Summary Judgment ("SOUF") (Dkt. 44) at ¶¶ 16-17, 133-135; Declaration of Elizabeth F. Edwards ("Edwards Decl.,"), in Support of Tyco's Motion for Partial Summary Judgment, Ex. 2, at 16079, 16095-098 (Dkt. 46)). Furthermore, contrary to Kozlowski's recasting of the ruling, this Court expressly cited additional uncontested facts in this record. For example, the Court relied on Kozlowski's use of Tyco's New York Relocation Program to steal funds and cover his activities and his use of stolen Tyco funds to invest in New York real estate and purchase artwork in New York. (Op. 8).

Kozlowski also incorrectly claims that this Court "[e]quat[ed] the presence of criminal jurisdiction with substantive choice-of-law" in the civil law suit against Kozlowski. (Mot. 12). In fact, the Court engaged in a thorough application of New York's choice-of-law rules to all the facts in this record and also considered Kozlowski's claim that the "internal affairs" doctrine governs the claims at issue.

Accordingly, Kozlowski's contention that the choice-of-law ruling "was a fundamental legal error," based on "an erroneous legal proposition" is entirely without merit. (Mot. 11-12). Because this Court's choice-of-law analysis did not involve a "'pure' question of law that the reviewing court 'could decide quickly and clearly without having to study the record,'" *Williston,* 410 F. Supp. 2d at 276, Kozlowski's motion should be denied.

C. Kozlowski Has Failed to Carry his Burden to Satisfy Any of the Requirements of § 1292.

1. The choice-of-law ruling does not involve a controlling question of law.

Section 1292(b) requires that the order being appealed must involve a "controlling question of law," which, for purposes of a § 1292(b) certification, means that reversal of the district court's order would terminate the action, result in dismissal, significantly affect the conduct of the action, or have precedential value to affect a large number of cases. *Credit Suisse First Boston*, 2006 U.S. Dist. LEXIS 68459, at *4-9. Kozlowski's motion meets none of these criteria.

Kozlowski concedes that Tyco's fiduciary, conversion and contract claims are unaffected by the choice-of-law ruling. (Op. 10). The parties also agree that there is no conflict between New York and Bermuda law except that, according to Kozlowski, Bermuda law does not recognize constructive fraud or the remedy of forfeiture of compensation. (Op. 10). Because this Court indicated that both New York and Bermuda law recognize the remedy of forfeiture of compensation, even if the appellate court determined that Bermuda law applies to these claims, it is unlikely that the Court's ruling would change. (Op. 16).

Kozlowski claims that certifying this Court's choice-of-law ruling for appeal "on the basis of [Kozlowski's] question would be consistent with" other cases "recognizing that choice-of-law rulings are questions of law appropriate for Section 1292(b) certification." (Mot. 9). Kozlowski's contention suggests that every choice-of-law ruling is appropriate for certification. This defies the plain language of the statute limiting certification to controlling questions of law and ignores that interlocutory appeals are "rare exceptions" to the final judgment rule. 28 U.S.C. § 1292(b); 28 U.S.C. § 1291; *Koehler,* 101 F.3d at 865.

Moreover, the cases Kozlowski cites in support of this contention are readily distinguishable. In two of the decisions, the appellate court does not analyze the § 1292 factors but simply accepts the interlocutory appeal from the district court's certification. (Mot. 9, citing *Groucho Marx Prod., Inc. v. Day & Night Co.*, 689 F.2d 317 (2d Cir. 1982), and *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir. 1973)). In the remaining cases, unlike here, the § 1292 factors are met. (Mot. 9, citing *Junco v. E. Air Lines, Inc.*, 399 F. Supp. 666, 667-68 (S.D.N.Y. 1975) (certifying decision granting motion to dismiss claims of two plaintiffs based on lack of standing under New York law, obviating any possibility of relief and not otherwise delaying ongoing proceedings); *In re Air Crash off Long Island*, 27 F. Supp. 2d 431, 434 (S.D.N.Y. 1998) (certifying question whether Death on the High Seas Act applied to airplane crash in US territorial waters, a question of first impression, where ultimate termination of multidistrict airplane crash litigation was materially advanced by immediate appeal); *Simon v. United States*, 341 F.3d 193, 199, 205 (3d Cir. 2003) (district court certified question that would dictate the outcome of the case and involved matter of first impression; the appellate court then certified to the Indiana Supreme Court two questions − whether Indiana courts would apply depecage and whether Indiana would apply its own substantive law or Pennsylvania's to the case).

Unlike the cases on which he relies, Kozlowski has failed to show that this Court's choice-of-law ruling involves a controlling question of law, that is, that reversal of the order would terminate the action, result in dismissal, significantly affect the conduct of the action, or have precedential value to affect a large number of cases. 28 U.S.C. § 1292(b); *Credit Suisse First Boston*, 2006 U.S. Dist. LEXIS 68459, at *4-9.

2. No substantial ground for difference of opinion exists.

Certification for interlocutory appeal pursuant to § 1292(b) requires the existence of a substantial ground for difference of opinion as to the question of law on appeal. The district court must "analyze the strength of the arguments in opposition to the challenged ruling, and determine whether there is 'substantial doubt' that the district court's order was correct." *Williston*, 410 F. Supp. 2d at 277. The mere fact that the parties themselves disagree as to the interpretation of persuasive authority does not constitute "a difference of opinion" sufficient to warrant certification. *Id.*; *Hubbell, Inc. v. Pass & Seymour, Inc.*, 1995 U.S. Dist. LEXIS 11050, at *4-5 (S.D.N.Y. Aug. 3, 1995). Kozlowski has asserted no credible basis for a "substantial ground for difference of opinion;" he merely offers his contrary legal interpretations, which this Court has previously rejected. (Mot. 11-14).

Kozlowski's entire argument on this point rests solely on his mischaracterization of the ruling he seeks to appeal. He asserts that "the Court based its choice-of-law analysis on an erroneous legal proposition" and found "it unnecessary to review the criminal record or relevant facts outside of the criminal record" to "effectively appl[y] a legal presumption that New York was the 'center of gravity' of civil claims based on the fact that a jury confirmed that criminal jurisdiction was present in New York in a related criminal proceeding." (Mot. 11). Kozlowski then asserts that "[s]uch a presumption is unsupportable." (Mot. 12).

Because Kozlowski mischaracterizes the District Court's ruling, his "sole question" for appeal is not appropriate for certification. (Mot. 9). Moreover, this Court engaged in the multi-step choice-of-law analysis required under established New York law and analyzed facts in the record to evaluate Kozlowski's contacts with New York through the lens of that jurisprudence. That the Court relied on no "legal presumption" is readily confirmed by a review of the Court's ruling. (Op. 7-8, 9-16). The Court cited Kozlowski's convictions arising from the New York Relocation Program and the fact that Kozlowski used funds illegally obtained to invest in New York real estate and purchase artwork in New York.[2] (Op. 8).

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[2] Nowhere does Kozlowski explain why Bermuda bears any relationship to Tyco's claims against him. Nor does he assert facts suggesting that any of his crimes occurred in Bermuda. Rather, Kozlowski states only that because Tyco International Ltd. was incorporated in Bermuda, the narrow "internal affairs" doctrine should govern Tyco's claims. On the record of undisputed facts showing that Kozlowski's breaches of fiduciary duty and other misconduct occurred in New York, this Court correctly rejected Kozlowski's argument.

Kozlowski's revisionism allows him to attack the Court's ruling as "disregard[ing] several factors critical to an appropriate choice-of-law analysis." (Mot. 13). Kozlowski submits that the so-called presumption "allowed the Court to distinguish, on legally erroneous grounds, the 'internal affairs' doctrine." (Mot. 13). Kozlowski offers no other explanation for this statement, but simply provides a string cite of cases where the doctrine was deemed to apply. (*Id.*). Kozlowski does not explain how the Court's reasoning is "legally erroneous." (Mot. 14).

Contrary to Kozlowski's baseless assertions, the Court expressly declined to apply the internal affairs doctrine because this case "does not involve issues of organic structure or internal administration within the meaning of the authorities" Kozlowski cites. (Op. at 15; Op. 13-16 (internal affairs analysis)). Rather, "[t]his case involves claims of [the] most serious kind of wrongdoing by a former officer, much of it occurring in New York." The Court properly determined that "even after the internal affairs doctrine is considered, New York still has the greater interest in applying its law to [the] constructive fraud cause of action and the forfeiture of compensation remedy." (Op. at 15). That Kozlowski disagrees with the Court's interpretation of New York's choice-of-law jurisprudence does not establish a meaningful difference of opinion for § 1292 purposes. *Hubbell*, 1995 U.S. Dist. LEXIS 11050, at *4-5.

Kozlowski also claims that his manufactured "legal presumption" allowed the Court to disregard the fact that in other dissimilar cases Tyco argued that Bermuda law should apply to breach of fiduciary duty claims, citing two derivative shareholder actions governed by New Hampshire choice-of-law rules. (Mot. 14) (citing *In re Tyco Int'l, Ltd.*, 340 F. Supp. 2d 94, 96 n.2 (D.N.H. 2004), and *Levin v. Kozlowski*, 2006 WL 3317048, at *3, 2006 NY Slip Op. 52142U (N.Y. Sup. Ct. Nov. 14, 2006)). In *In re Tyco International Ltd.*, the court held that Bermuda law applied because a shareholder's ability to bring a *derivative action* is determined by reference to the law of the corporation's place of incorporation. 340 F. Supp. 2d at 96 n.2 (citing N.H. Rev. Stat. Ann. § 293-A:7.47 (1999)). In *Levin*, the court held that plaintiffs' claims were substantially identical to the claims raised in *In re Tyco International Ltd.*, and, therefore, the plaintiffs were precluded from relitigating any of the issues present in that case, including choice of law. *Levin*, 2006 WL 3317048, 2006 NY Slip Op. 52142U, at *12-13.

The instant case does not involve shareholders' rights to bring derivative actions, so as this Court held, Tyco's claims against Kozlowski do not involve issues of internal administration or organic structure but, rather, claims of the "most serious kind of wrongdoing by a former officer, much of it occurring in New York." (Op. 15). Accordingly, the second § 1292 requirement is not met. *See In re Williston*, 410 F. Supp. 2d at 277 (denying § 1292(b) certification when the two cases presented involved "differences in the factual allegations" rather than "substantial ground for difference of opinion as to a controlling question of law").

Finally, Kozlowski claims the "legal presumption" the Court supposedly employed "allowed the Court to distinguish, on legally erroneous grounds," Judge Cote's choice-of-law ruling in *Tyco International Ltd. v. Walsh*, 2010 U.S. Dist. LEXIS 111571 (S.D.N.Y. Oct. 20, 2010) ("*Tyco v. Walsh*" or "*Walsh*"), which (erroneously), according to Kozlowski, was "based on the exact same transaction that underlies one of the most significant claims against Mr. Kozlowski in this case and was the basis for one of Mr. Kozlowski's criminal convictions." (Mot. 14). This argument borders on the absurd.

Noting that *Tyco v. Walsh* involved a different defendant, different conduct and different claims, this Court expressly distinguished the facts at issue in *Walsh* from the facts presented here and relied on no "legal presumption" in doing so. The Court reasoned that the *Walsh* case concerned interpretation of Tyco's bye-laws, which are governed by Bermuda law, and that the conduct at issue in *Walsh* occurred in Bermuda while connections to New York were minimal. (Op. 14-15). That one of Kozlowski's 22 convictions arose from his unauthorized payment to a Tyco director does not create a "substantial ground for difference of opinion" as to the correctness of the Court's choice-of-law ruling. *In re Williston*, 410 F. Supp. 2d at 277.

In its choice-of-law analysis, the Court applied well established tenets of New York choice-of-law jurisprudence. The Court applied no "legal presumption" over the course of its analysis. (Op. 7-8, 9-16). Kozlowski's opportunistic misreading of the Court's opinion does not create a "substantial difference of opinion." Accordingly, Kozlowski's argument in support of the second § 1292(b) requirement is meritless.

3. Premature interlocutory appeal will delay, not advance, the termination of the litigation.

Certification under § 1292(b) also requires that an interlocutory appeal materially advance the ultimate termination of the litigation. *Credit Suisse First Boston,* 2006 U.S. Dist. LEXIS 68459, at *7-9 (the "appeal [must] promise[] to advance the time for trial or to shorten the time required for trial"). Here, an interlocutory appeal on the choice-of-law issue will not shorten the time required for trial.

Even if Kozlowski were to prevail on an immediate appeal of the choice-of-law ruling, and if the Second Circuit should determine that Bermuda law applies *and* that Bermuda law does not recognize a forfeiture of compensation remedy for breach of fiduciary duty, a trial or summary judgment proceeding on damages still would be required.

Conversely, if Kozlowski's motion is denied, Tyco intends to move for summary judgment on certain of its damages claims, which might be dispositive of Tyco's right to recovery. Then, Kozlowski's appeal of the choice-of-law and all other adverse rulings could proceed. Accordingly, Kozlowski's repeated assertion, without explanation, that absent an interlocutory appeal the parties will have to proceed with a "complex, but relatively inconsequential, trial on the remaining issues" − which, notably, he fails to identify − is wrong. (Mot. 2, 3, 7, 15).

Kozlowski also claims that granting his motion for certification of an interlocutory appeal will enhance the likelihood of a settlement as he has "little practical choice other than to keep litigating until the [Summary Judgment Order] can be appealed." (Mot. 15-16). This, of course, is not an argument unique to Kozlowski or the instant case and is certainly true for any number of parties who have lost on summary judgment. Therefore, it cannot be the basis for support for this motion seeking a "rare exception" to the final judgment rule. Notwithstanding this, Kozlowski fails to make any showing how immediate appellate review would increase the likelihood of settlement of this matter. (*Id.*). And, certification of the choice-of-law ruling will only delay a summary judgment ruling or trial on damages.

There can be no question that reversal of this Court's decision to apply New York law would not terminate the action. Rather, the case likely would be remanded and the Court would be required to ascertain the effect of foreign law on Tyco's breach of fiduciary duty remedy. While acknowledging the difficulty of determining whether the forfeiture of compensation remedy or defense under Bermuda law would apply to a case involving a corporate officer, the Court also noted its belief "that both New York and Bermuda law would recognize such a remedy." (Op. 10, 16). Accordingly, even if the appellate court were to determine that Bermuda law should apply, it is likely that the District's Court's ruling would remain the same. Moreover, the choice-of-law ruling will have no material effect on the Court's dismissal of Kozlowski's counterclaims. Therefore, Kozlowski cannot fulfill his burden of showing that immediate appellate review of the issue he identified will advance the termination of this litigation in any meaningful way.

Because Kozlowski has provided no basis for certifying an interlocutory appeal of this Court's choice-of-law ruling in its Summary Judgment Order, Kozlowski's motion pursuant to 28 U.S.C. § 1292 should be denied.

II. This Court Should Not Enter Final Judgment on Any of Kozlowski's Counterclaims Under Rule 54(b).

A. The Legal Standard for Entry of a Final Judgment Pursuant to Rule 54(b).

Rule 54(b) of the Federal Rules of Civil Procedure provides a second limited exception to the final judgment rule: "When an action presents more than one claim for relief . . . the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay" and upon an express direction for the entry of judgment. Fed. R. Civ. P. 54(b). In general, judgment under Rule 54(b) on fewer than all claims in an action should not be entered "if the same or closely related issues remain to be litigated." *Cullen v. Margiotta*, 811 F.2d 698, 710, 711 (2d Cir. 1987) ("[i]n a case involving multiple claims, the court should not enter final judgment dismissing a given claim unless that claim is separable from the claims that survive").

The policy behind this separate and distinct requirement of Rule 54(b) is the desire to avoid redundant review of multiple appeals based on the same underlying facts and issues of law. *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980). Rule 54(b) dismissal of claims which are factually or legally interrelated with remaining claims risks the possibility that an appellate court would face the same issue on a subsequent appeal. *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 73 F. Supp. 2d 345, 346 (S.D.N.Y. 1999). In addition, "[n]ot all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims." *Curtiss-Wright Corp.*, 446 U.S. at 8. The district court must determine that the final decision on certain claims is ready for appeal, taking into account the equities involved as well as judicial administrative interests. *See id.*

Moreover, certification under Rule 54(b) should be granted only if there are "interest[s] of sound judicial administration" and efficiency to be served or, in the "infrequent harsh case" where "there exists some danger of hardship or injustice through delay which would be alleviated by immediate appeal." *Harriscom Svenska AB v. Harris Corp.*, 947 F.2d 627, 629 (2d Cir. 1991) (internal quotations omitted); 10 *Moore's Federal Practice,* § 54.23[2] (Matthew Bender 3d ed. 1999) (to permit entry of a final, immediately appealable Rule 54(b) judgment, a court must make an express determination that there is no just reason for delay). Because the Second Circuit, and federal courts in general, are historically opposed to piecemeal appeals, the court's power to enter a final judgment before an entire case is concluded should be exercised sparingly. *Cullen*, 811 F.2d at 710.

B. Kozlowski's Counterclaims Involve Questions of Fact and Law Related to Those Underlying the Affirmative Claims.

"Claims are normally regarded as separable if they involve at least some different questions of fact and law and could be separately enforced." *Cullen*, 811 F.2d at 711. Here, all of Kozlowski's counterclaims arise out of the same business relationship as Tyco's claims, and the misconduct that forms the basis of Tyco's claims also forms the basis for all of Tyco's defenses against Kozlowski's counterclaims. With the exception of Tyco's breach of contract claim − on which Kozlowski has conceded liability − Kozlowski's counterclaims are factually interrelated with Tyco's affirmative claims.

Analyzing the undisputed facts, this Court concluded that Kozlowski engaged in a period of disloyalty from 1995-2002. (Op. 18-19). Based on this finding, the Court entered judgment in favor of Tyco as to Kozlowski's liability on Tyco's fiduciary and conversion claims. (Op. 17-18). Also based on this finding, the Court dismissed all but two of Kozlowski's counterclaims. (Op. 21-24).

This Court applied two primary legal theories to Kozlowski's counterclaims − fraudulent inducement and the forfeiture of compensation. (Op. 21-24). The Court found that three contracts for which Kozlowski seeks damages for breach − the ERA, Retention Agreement, and the Life Insurance and Shared Ownership Insurance Agreement − were entered into after Kozlowski's first breach of fiduciary duty in 1995. (Op. 21). Accordingly, the Court ruled that "[b]ecause Kozlowski failed to disclose his many breaches of fiduciary duty to Tyco, these contracts were fraudulently induced and are therefore voidable by Tyco." (Op. 21). "Even were they not fraudulently induced, Kozlowski would not be able to collect benefits under these agreement[s] as they accrued during a period of Kozlowski's faithless service to Tyco." (Op. 21).

The Court held that the fraudulent inducement analysis was the same for each contract regardless whether the contracts were governed by Bermuda law or New York law. (Op. 21). "Both New York and Bermuda recognize the defense of fraudulent inducement" and in both jurisdictions "the failure of a fiduciary to disclose a previous breach of fiduciary duty amounts to a known misrepresentation of a material fact." (Op. 22).

Noting its previous ruling that Kozlowski's convictions for falsification of business records and grand larceny conclusively established his many breaches of fiduciary duty, the Court observed that "[a]ll of these agreements were entered into in the midst of Kozlowski's many breaches of fiduciary duty and without disclosure by Kozlowski" and "Tyco's reliance on these misstatements is demonstrated by the fact that Kozlowski remained at the helm of the company." (Op. 22). "Therefore," the Court concluded, "Tyco has a defense to enforcement of all contracts entered into subsequent to the beginning of Kozlowski's misconduct, and is entitled to summary judgment." (Op. 22-23).

Further illustrating the intertwined nature of the parties' claims and defenses, the Court stated that the faithless servant doctrine, "used as a sword in Tyco's claims, may also be used as a shield to Kozlowski's counterclaims." (Op. 23). The Court then held that "[a]s a result of Kozlowski's many breaches fiduciary duty, Tyco has no duty to honor compensation agreements made *during Kozlowski's period of disloyalty*." (Op. 23) (emphasis added). "Because all of the benefits at issue in these contracts were earned during Kozlowski's period of disloyalty, Tyco is relieved from any obligation to honor them" and "Tyco is entitled to summary judgment dismissing Kozlowski's" counterclaims based on the ERA, Retention Agreement and Shared Ownership Life Insurance Agreement (Op. 24), "[e]ven if these contracts were validly entered into." (Op. 23). Accordingly, this Court's ruling that the forfeiture of compensation doctrine applied to Tyco's fiduciary and conversion claims and nearly all of Kozlowski's counterclaims shows that common facts and common legal theories connect those claims and that Kozlowski's counterclaims cannot be severed and appealed before Tyco's affirmative claims.

This Court's ruling that Tyco is not obligated to pay Kozlowski's benefits because he fraudulently induced those benefits also shows the interconnectedness of the parties' claims. The Court found that three contracts for which Kozlowski seeks damages for breach − the ERA, Retention Agreement, and the Life Insurance and Shared Ownership Insurance Agreement − were entered into subsequent to Kozlowski's first breach of fiduciary duty in 1995. (Op. 21).

Accordingly, the Court ruled that "[b]ecause Kozlowski failed to disclose his many breaches of fiduciary duty to Tyco, these contracts were fraudulently induced and are therefore voidable by Tyco." (Op. 21). Again illustrating the interconnectedness of the claims and defenses, this Court held that "[e]ven were they not fraudulently induced, Kozlowski would not be able to collect benefits under these agreement[s] as they accrued during a period of Kozlowski's faithless service to Tyco." (*Id.*).

Even the Court's rulings on Kozlowski's conversion and New York labor law claims are related to the misconduct at the heart of the affirmative claims. (Op. 27) (dismissing the thirteenth counterclaim because Kozlowski has no valid claim to "the compensation that underlies all of his other causes of action" and dismissing the fourteenth counterclaim because Kozlowski "has no claim to the compensation he alleges is being withheld"). And, the Court dismissed Kozlowski's equitable claims (the seventh, eighth, tenth, eleventh and twelfth counterclaims) because "he comes to the court with unclean hands" as a result of the same misconduct. (Op. 26).

Moreover, the Court dismissed in part the counterclaims based on the DCP and SERP plans because under federal common law, as under the faithless servant doctrine, an employer is entitled to withhold benefits accrued during the period of a beneficiary's disloyalty. (Op. 25-26) (ruling Tyco is entitled to partial summary judgment dismissing Kozlowski's third and fourth counterclaims "as to all benefits accrued after the beginning of his misconduct" which began, at the latest, in September 1995). Finally, the Court ruled that Kozlowski could recover "nothing on the Retention Agreement" and granted summary judgment to Tyco on its declaratory judgment cause of action "[f]or reasons discussed later in connection with the second counterclaim" seeking to recover under that agreement. (Op. 19-20; *see also* Op. 21 (holding that the Retention Agreement − and the ERA and Shared Ownership Insurance Agreement − were voidable by Tyco because "Kozlowski failed to disclose his many breaches of fiduciary duty to Tyco" and "[e]ven if they were not fraudulently induced . . . they accrued during a period of Kozlowski's faithless service to Tyco," so he can not recover benefits under the agreement).

Here, the facts cannot be severed by transaction or even temporally because the Court determined that Kozlowski's disloyalty began "at the latest" in September 1995 and continued until his departure from Tyco in June 2002. Further linking Tyco's affirmative claims to its defense to many of Kozlowski's counterclaims, the Court noted that "Kozlowski's convictions for falsification of business records and grand larceny conclusively establish his many breaches of fiduciary duty [and] [a]ll of these agreements were entered into in the midst of Kozlowski's many breaches of fiduciary duty and without disclosure by Kozlowski." (Op. 22). "Therefore," the Court concluded, "Tyco has a defense to enforcement of all contracts entered into subsequent to the beginning of Kozlowski's misconduct, and is entitled to summary judgment dismissing Kozlowski's first, second, and ninth counterclaims." (Op. 22-23).

Finally, it was Kozlowski's conduct while serving as Tyco's Chief Executive Officer and Chairman that forms the basis of Tyco's affirmative claims and its defenses to many of Kozlowski's counterclaims. Also, as its CEO, Kozlowski caused Tyco to enter into the various compensation agreements that form the basis of his claims against Tyco. (Op. at 2-3). Accordingly, it cannot be disputed that Kozlowski's counterclaims and Tyco's affirmative claims and defenses arise out of the same business relationship. *See Gidatex*, 73 F. Supp. 2d at 347 (denying Rule 54(b) motion seeking to appeal dismissal of counterclaims prior to trial of plaintiff's claims because the counterclaims arose out of the same business relationship as the affirmative claims and it was likely that at trial, the issues the defendant would most likely raise in its defense would overlap with the evidence supporting the counterclaims).

The interconnectedness of the claims and counterclaims at issue form an independent basis for denying Kozlowski's Rule 54(b) motion.

C. Kozlowski Cannot Demonstrate that "There is No Just Reason for Delay" of This Appeal.

The Second Circuit has held that danger of hardship or injustice through delay would be alleviated where "an expensive and duplicative trial could be avoided if, without delaying prosecution of the surviving claims, a dismissed claim were reversed in time to be tried with the other claims." *Cullen*, 811 F.2d at 711; *see also Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 16 (2d Cir. 1997) (a court may properly find no just reason for delay only when "there exists some danger of hardship or injustice through delay which would be alleviated by immediate appeal"). By contrast, liability here has been established on some of Tyco's claims and the parties are ready to go to trial or begin summary judgment proceedings. Accordingly, these claims will be resolved long before the Second Circuit is likely to reach any appeal resulting from granting Kozlowski's Rule 54(b) motion. *Gidatex*, 73 F. Supp. 2d at 347 (noting that a "seasoned district judge" should be aware of lengthy time-delays between her decision and the date when an appeal is heard) (citing *Rodriguez v. DeBuono*, 162 F.3d 56, 62 (2d Cir. 1998)).

Moreover, entering a Rule 54(b) final judgment order on counterclaims that are intertwined with the remaining claims might result in redundant, if not possibly inconsistent, appeals. *Curtiss-Wright Corp.*, 446 U.S. at 8. If Kozlowski's motion is granted, a short trial on damages or summary judgment proceeding on damages will occur on Tyco's affirmative claims while Kozlowski's counterclaims are on appeal. At this point, Tyco's fiduciary, conversion and breach of contract claims will be final and appealable. However, Kozlowski's counterclaims − arising from the same underlying facts − will be on a separate appellate track. This risk of redundant or inconsistent appeals without any showing that a just reason for delay exists would be unfair to Tyco and, in considering Rule 54(b) motions, district courts must consider the "interest of sound judicial administration," *Curtiss-Wright*, 446 U.S. at 8, and "the equities involved," chiefly "fairness to the parties." *N.Y. v. Amro Realty Corp.,* 936 F.2d 1420, 1425-26 (2d Cir. 1991).

Kozlowski also concedes that open issues remain as to two of his counterclaims. (Mot. 18, n.2). The Court found that the DCP and SERP, the subjects of Kozlowski's third and fourth counterclaims, were entered into before September 1995 and, accordingly, Tyco is entitled to partial summary judgment as to all benefits accruing after the beginning of his misconduct. (Op. 24-26). The Court also observed that Tyco could try to prove that Kozlowski's period of disloyalty began before this date. (Op. 26). Accordingly, Kozlowski's assertion that his counterclaims "have been finally decided" is incorrect and he cannot satisfy the Rule 54(b) requirements. (Mot. 17).

Finally, Kozlowski's request that this Court grant him leave to appeal the dismissal of his counterclaims is not well taken because he is seeking extraordinary relief when he failed even to respond to Tyco's Motion for Summary Judgment as to defenses which were dispositive of 13 of his 14 counterclaims. (Tyco's Reply Brief in Support of Motion for Partial Summary Judgment (Dkt. No. 66) at 22-24). Accordingly, Kozlowski should not be heard to argue that "judicial efficiencies warrant immediate entry of final judgment." (Mot. 18).

Because Kozlowski cannot establish that "there exists some danger of hardship or injustice through delay" to Kozlowski "which would be alleviated by immediate appeal," Kozlowski's Rule 54(b) motion should be dismissed. *Advanced Magnetics*, 106 F.3d at 16.

CONCLUSION

For the reasons stated above, Kozlowski's Motion for Certification for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) and Motion for Entry of Partial Final Judgment Pursuant to Rule 54(b) should be denied.

Dated: January 26, 2011

Respectfully submitted,

TYCO INTERNATIONAL LTD and
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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of January, 2011, I electronically filed the foregoing *Memorandum Of Law In Opposition To Kozlowski's Motion For Certification For Interlocutory Appeal Pursuant to 28 U.S.C. § 1292 and For Entry of Partial Summary Judgment Pursuant To Fed. R. Civ. P. 54(b)* with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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